



Department of the Secretary of State

Regulatory Fairness Board

Friday, January 6, 2012

1:00 – 2:30 p.m.

Meeting Notes

In attendance:

Board Members:

Mr. Charles E. Summers, Jr., Secretary of State - Chairman

Mr. Mark A. Tyler, Oakland - Vice Chairman

Ms. Patricia Kuhl

Mr. Michael R. Cote

Hon. Douglas Smith (via phone)

Jay Martin, Small Business Advocate

Other Attendees:

Phyllis Gardiner, Assistant Attorney General

Barbara Redmond, Chief Deputy Secretary of State

The meeting opened with introductions.

Secretary Summers explained that the role of the Regulatory Fairness Board is to review state regulations then make recommendations to alter or eliminate those that are obsolete and/or ineffective, especially those that are damaging small businesses. With the new administration's focus on improving Maine's regulatory environment, there is new life breathed into this Board. Among all the responsibilities he fulfills in service on various boards, this one he expects to be both the most enjoyable and yet frustrating, as we may learn that there is good reason for many regulations. The input from Ms. Gardiner, Deputy Secretary Redmond, and others will be a big help. He quoted the clause from PL Ch. 304 that summarizes the Board's mission statement, saying this one sentence can mean a lot of work and impact.

§ 90-T. Regulatory Fairness Board

The Regulatory Fairness Board, referred to in this section as "the board," is established within the Department of the Secretary of State to hear testimony and to report to the Legislature and the Governor at least annually on regulatory and statutory changes necessary to enhance the State's business climate.

Mr. Martin distributed the reference information prepared by Ms. Gardiner (*Attachment I*).

Ms. Gardiner provided a brief overview of the function of this Board. As all meetings are open to the public, this information includes procedures for holding such meetings. She cautioned the

Board to please avoid transacting business of any significance by email, as all proceedings must be open to the public. Secretary Summers underscored that all communications are open to the public through the Freedom of Information Act. She urged the Board to remind the public that any information it divulges is also under public scrutiny, unless the (fairly narrow) confidentiality provision applies, such as trade secrets, etc. She said the Board may enter Executive Session when discussing such confidential information, and reviewed the pertinent protocol. Public notice for all meetings is required, though there are no defined parameters. She replied to Secretary Summers' question about the appropriate advance notice on meetings, saying two to four weeks is typical and appropriate. She believes it is helpful to state whether the Board is seeking specific input on particular regulatory issues or general issues. There exist no specified procedures, but that the Board can define them, such as time limits for speakers, etc. The public may attend, but the right to speak may/may not be granted by the Board, as the Board must have some control over the proceedings. Regarding record-keeping, requirements are minimal: keep minutes; record actions; and make information public. The statutory definition of "records": communication received or prepared for use in transacting Board business, regardless of whether this information is stored on a personal computer. She recommended keeping all Board communications stored in a single folder on our computers to streamline responding to Freedom of Access requests. She concurred when Mr. Martin asked whether audio recordings are considered "records". All state agencies, boards, and commissions have time limits for records storage. Mr. Martin offered to determine the exact record retention period required. She reviewed the quorum qualifications (three members present). She concluded her presentation by saying that there are not many regulatory requirements for the Board to meet.

Note: Mr. Martin has since contacted the Director of Records Management Services at the Maine State Archives to determine how long records must be kept. He received a document outlining that the in-agency retention period is five years, and the records center retention period is 10 years. The document indicated that any records we wish to destroy must be presented to the Archives Advisory Group for consideration.

Mr. Smith asked that if the Board or a subset of the Board were to request Mr. Martin to respond to a specific complaint and gather facts to assist the Board, would this information be considered public record, even if includes information indicating violations. Ms. Gardiner responded that yes, such information would likely be open to the public. There are no confidentiality protections unless the information is proprietary. There are no provisions within the Office of the Small Business Advocate or the Regulatory Fairness Board that establish confidentiality privileges.

Mr. Martin explained that his office has established, with considerable assistance from Ms. Gardiner, two forms that clients must review and sign prior to receiving assistance: a written disclaimer indicating that there exists no attorney/client privilege; and a Privacy Act disclaimer that enables the Advocate to request information about a business from other governmental agencies. Thus, we are informing those who contact us nearly immediately that no confidentiality exists. Mr. Smith said he was glad to know that protocols exist to inform the public about confidentiality concerns.

Secretary Summers asked Ms. Gardiner whether Board meetings via conference call are considered allowable, and what steps if any would the Board need to take to ensure full public participation. Ms. Gardiner said this question arises frequently. Currently, "present" means physically present for a quorum count. An advisory committee is currently considering legislation that would allow teleconference and videoconference attendees to be considered "present".

Mr. Cote asked whether there exists any potential personal liability and protections for Board members as a result of their participation. Ms. Gardiner replied saying that Board members function as state officials, and that the Tort Claims Act has a broad definition to include the Board. Secretary Summers asked whether this is similar to the Legislature; Ms. Gardiner said yes, but that the Board members are not making decisions that can directly affect others as it serves in an advisory capacity.

Mr. Martin gave an update on his activities. He said it has been a real pleasure getting his office operational. Much work involves getting the word out about assistance now available. He reviewed an outreach report he shared with the Board (*Attachment II*). He said he has received a great deal of encouraging support. The office has received many calls for assistance. He outlined the three aspects of the office:

1. **Direct Advocacy** – determining whether and how to assist businesses that register grievances with our office, including doing the necessary fact finding by: interviewing the business owner and other stakeholders; consulting with the Secretary of State and his senior staff, the Attorney General’s office, regulatory agencies and others; and contacting regulatory agency commissioners to achieve equitable resolutions to legitimate grievances
2. **Pending Rules and Legislation** – commenting on rules and testifying on pending legislation that may impact small businesses.
3. **Staffing the Regulatory Fairness Board** – assisting in organizing meetings, keeping records, etc.

His office is closely coordinating efforts with the Dept. of Economic and Community Development (DECD) on promotions and referrals, and has formed positive working relationships in this effort. His office has closed four cases to date and has 15 cases open. He presented three examples:

1. A restaurant owner who needs to replace an obsolete ventilation system was thus facing a denial of his liquor license renewal. He worked with the State Fire Marshall’s office to get the owner moving towards replacing this system so that the Marshall could offer an extension in good faith.
2. A Large Game Shooting Area owner (LGSA) wants to move his location. The Dept. of Agriculture has ruled against this, and the Attorney General’s office has said the statutes do not allow for such movement. His office is now working with a local senator to support amending the statute to enable such licenses to be moved.
3. A third, significant case involved a drug store owner who staffs three pharmacists, including himself. One long-time pharmacist failed to renew his license for three years. When DHHS MaineCare learned of this in 2011, they assessed a recoupment penalty of \$473,000, an amount approximate to one-third of all MaineCare prescriptions filled over the three year lapse. The owner had little means to pay this. His office worked with his lawyer and the Attorney General’s office, and helped generate three documents that were submitted for the DHHS audit division’s “desk review” (pre-formal appeal process). One letter came from the Dept. of Professional and Financial Regulation, citing that they had investigated their faulty pharmacy inspection report that failed to note the expired license a mere five months after it first lapsed. One letter came from a former state senator who testified to the owner’s high character and importance of this drug store to the community. His office submitted a letter citing that his office believes a reasonable resolution of this matter would be for DHHS to recoup the dispensing fees only (i.e. profit made on filling the prescriptions) and that the time span in question should be

limited to only the five month period prior to the faulty inspection report. The case is now nearing final settlement at the amount of under \$30,000. This is a classic example of why and how this office functions, preventing regulatory agencies from unnecessarily shutting down businesses.

Mr. Cote said that he believes that this is a very interesting opportunity and that because many cases will be resolved by the Advocate, he asked what role would the Board then play.

Mr. Martin explained that as he promotes the Regulatory Fairness Board, he uses the metaphor of “potholes”. Certain industries travel the same regulatory roads to meet certain common requirements. For example, let’s say the restaurant industry rides Route 69, and the boatbuilding industry travels Route 123. All Maine boat builders know that on Mile 3 of Route 123, there is an enormous pothole where they have learned to slow down as they drive through it, then wonder when that pothole will be filled. Some businesses may take a chance with their safety and the safety of others in driving across the double-yellow line around the pothole, breaking the law. He believes it is the job of the Board to identify these “potholes”, debate whether they are instead actually helpful “speed bumps” as regulatory agents might argue, then decide whether to recommend that the Governor and the Legislature get the DOT truck to fix them. One example is the definition of how to define an “employee” vs. an “independent contractor.” He has been invited to participate in the Employment Standards Stakeholders Group - 24 people from the private and public sector attempting to clarify these definitions. This, and the cost of health insurance, is among the most common complaints he hears. He offered to do preliminary research on such issues the Board identifies.

Secretary Summers said the Board could work to identify and resolve the most onerous regulatory problems, and asked Mr. Smith for help on getting started.

Ms. Gardiner responded that Mr. Martin’s advocacy work and the issues the Board learns about through public hearings will likely identify the pertinent issues. The rulemaking process can be effective.

Mr. Martin is reviewing the past RFB annual reports. The Governor’s office has approved his request to review notes taken during the regulatory reform workshops it launched not long after taking office.

Ms. Kuhl asked if there are any reports on the cost of regulation compliance. Mr. Martin said he follows issues on the federal level, referencing the SBA and its Office of Advocacy. Perhaps one of Maine’s think tanks would look into this issue.

Mr. Smith said that there are reports of these costs and asked Mr. Martin to research them (who agreed). He said these costs are real but hard to nail down, as small businesses have no means of tracking costs. Large businesses can segregate such costs. National studies exist, but may be a few years old.

***Note:** Mr. Martin has emailed the Board three reports on the cost of regulatory compliance.*

Ms. Gardiner said the Administrative Procedures Act governing rulemaking now demands that costs must be determined while rules are established. Ms. Kuhl asked whether these costs are based in reality. Ms. Gardiner replied saying it is hard to determine without public input, which is often lacking.

Secretary Summers requested nominations for the Vice Chair position. He inquired who may be interested in serving as Vice Chair. Mr. Smith declined as he is out of state for three-four months of the year. Mr. Cote cited his hectic travel schedule. Mr. Tyler said he was open to consideration.

Motion by Secretary Summers to nominate Mark Tyler as Vice Chair.

Seconded by Mike Cote.

Vote to approve: unanimous. Congratulations and thanks expressed by the Board to Mr. Tyler.

Secretary Summers asked if there are any other issues to be addressed.

Mr. Martin asked if the Board is interested in hearing from him about issues that he is learning as he conducts his work, citing an example of the water treatment industry (water filters, etc.) being required to hire licensed plumbers to conduct installations. This industry is complaining about this requirement.

Secretary Summers suggested we could put the issue on the next agenda. He asked for other comment.

Mr. Smith said the common denominator approach will help the Board understand the larger trends, so Mr. Martin's assistance in identifying these will be very helpful to the Board as we work as efficiently and cost-effectively as possible.

Secretary Summers addressed the "Tasks" item on the agenda. The Board must submit a report by February 1. A newly formed board may not have many or any recommendations. Mr. Martin will be submitting a report indicating that the Board has been formed and has convened its first meeting.

§90-T, 4-C:

Report annually by February 1st to the Governor and the joint standing committee of the Legislature having jurisdiction over business matters on actions taken by the special advocate and the Secretary of State to resolve complaints concerning agency enforcement actions against small businesses. The report may also include recommendations for statutory changes that will bring more clarity, consistency and transparency in rules affecting the small business community.

Secretary Summers believes the Legislature is very interested in the status of this Board, and of the Small Business Advocate. It is important to meet this report deadline, and address these expectations, as the Governor and the Legislature wants to see progress on regulatory reform. Mr. Martin can share with the Board stories of businesses that have been struggling with regulatory issues for so long, they have perhaps reached the court system and are now outside of our scope. This can be frustrating as we want to assist those with legitimate grievances. Let's measure success in feet and feet in inches. The Board is mandated to meet at least three times a year. He asked if the Board would prefer to meet more often, perhaps quarterly.

Board discussion: the Board achieved a consensus that it should meet more frequently than three times per year. Friday at 1 pm was determined as a convenient time to meet, in general.

Secretary Summers said his office would put this Board on our daily news clips circulation, will post in advance the date and location of our meeting well in advance in print media and on websites, and will promote these meetings to Maine trade associations, such as Maine Oil Dealers assoc., etc. He suggested that the Board could invite the Maine Restaurant Association to the next meeting.

***Note:** Mr. Martin invited and confirmed that Mr. Richard Grotton, President of the Maine Restaurant Association, will be presenting at the RFB meeting on February 24.*

Mr. Smith said it would be helpful for us to determine some goals for the Board to include within the report. Secretary Summers agreed and asked Mr. Martin to follow up. Mr. Smith believes that Maine Forest Products Association should be included in the press release distribution and Mr. Tyler added that the Maine Food Alliance should also be included.

Secretary Summers suggested that members could consider pursuing speaking opportunities through local service clubs, and recommended checking in with this office to review talking points. Sen. Smith added a request that any presentations be shared among Board members.

Ms. Kuhl requested a hand-out describing the Regulatory Fairness Board. Mr. Martin offered to devise a hand-out similar to the Small Business Advocate Fact Sheet. Chief Deputy Secretary Redmond suggested that these hand-outs be printed front-to-back.

Sen. Smith inquired whether any members of the public were present at this meeting (none). Mr. Martin apologized for not issuing a public notice of this meeting. Secretary Summers said his office would send out a press release announcing the formation of the Board when we announce the next meeting.

***Note:** The office of the Secretary of State issued this press release on Tuesday, January 24, 2012 (Attachment III).*

Motion by Secretary Summers to adjourn

Seconded by Sen. Smith

Voted: unanimous

NEXT MEETING:

Friday, February 24, 1:00 - 3:00 pm. at the Secretary of State's Office, 103 Sewall St., Augusta.

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Attachment II – Outreach Report

MEMORANDUM

TO: Secretary of State Charles E. Summers, Jr.
FROM: Small Business Advocate Jay Martin
CC: Chief Deputy Secretary of State Barbara Redmond, Deputy Secretary of State Lynn Harvey,
Regulatory Fairness Board
RE: Outreach Report
DATE: Friday, January 6, 2011

I wish to share with you a full tally of our efforts to inform Maine small businesses and public sector stakeholders of the advocacy assistance now available through our office.

Media Events (6):

10/14 Taped interview with Irwin Gratz, MPBN
10/14 Taped interview with WZON
10/15 Live interview with Ken and Mike, WGAN, Portland
10/20 Filmed interview with MaineBiz Magazine; 11/4 Print interview with MaineBiz Magazine
12/19 Filmed interview with Dick Giroux, Biddeford Public Access TV

Business Outreach (19):

10/12 Kennebec Valley Chamber of Commerce B2B Expo
10/18 John Holden, Eaton Peabody Business Development Director, lunch meeting
10/19 Maine Restaurant Association annual meeting
10/21 Oxford County B2B Expo
10/26 Bangor Chamber of Commerce breakfast meeting
10/27 Maine Food Summit B2B Expo
11/3 MaineBiz Awards event
11/4 Maine Assoc. of Mortgage Professionals meeting
11/7 Chris Pinkham, President, Maine Banker's Assoc. meeting
11/15 Maine Manufactured Housing Board meeting
11/16 Business Networking International open house
11/17 Gov. LePage's Job Creation Workshop
11/20 Momentum Convention, Augusta Civic Center
11/22 Michael Bourque, Sr. VP, MEMIC meeting
11/30 "Maine Compliance Plus Program" for Manufacturers meeting
12/1 Sunrise County Economic Development Council annual meeting
12/5 Fairpoint Communications meeting
12/8 Maine Real Estate & Development Association meeting
12/14 Maine Marine Trade Association annual meeting

Executive and Legislative Outreach (9):

10/14 Maine House Republicans policy briefing
10/25 Speaker of the House Nutting meeting
10/31 DEP meeting
11/3 DECD meeting
11/1 Governor LePage meeting
11/7 FAME and DECD meeting
11/7 President of the Senate Raye meeting
11/21 Department of Professional and Financial Regulation Commissioner Anne Head meeting
12/8 Small Business Advocate and DECD Informational Presentation for all Legislative Staff

Attachment III

FOR IMMEDIATE RELEASE

January 24, 2012

Contact: Megan D. Sanborn

(207) 441-0501

Maine Regulatory Fairness Board to Meet in Augusta, February 24

The Maine Regulatory Fairness Board (RFB) invites public testimony on regulatory and statutory issues that impact Maine businesses at its next meeting on Friday, February 24 from 1:00 p.m. to 3:00 p.m. at the Secretary of State's office, located at 103 Sewall Street in Augusta.

To effectively report to the Legislature and the Governor on regulatory conflicts, the Board elicits public comment from Maine business owners/managers and the public concerning: specific state rules and regulations that may unreasonably impede business sustainability and growth; and recommendations for regulatory and statutory change that may enhance Maine's business climate.

The Board holds hearings in Augusta and statewide to invite testimony that highlights and details regulations in need of scrutiny and amendment. The Board also weighs public comments and addresses administrative matters to advance operational goals and objectives. These public comments directly set the Board's agendas and greatly inform the Board's recommendations to the Governor and the Legislature. Public participation is an essential element to achieving the Board's goals and objectives. The Board encourages businesses to please consider attending meetings whenever possible to share their valuable insights.

The Board is chaired by Secretary of State, Charles E. Summers, Jr. and is comprised of four members, who are or have been owners or operators of Maine businesses. It is staffed by Maine's Small Business Advocate, Jay Martin. Private sector members of the Board volunteer their time and their unique expertise to serve as liaisons between the State's business community, regulatory authorities, and lawmakers.

Members:

- Secretary of State Charles E. Summers, Jr., Scarborough - Chairman
- Mr. Mark A. Tyler, Oakland - Vice Chairman
- Ms. Patricia Kuhl, Brunswick
- Mr. Michael R. Cote, Whiting
- Hon. Douglas Smith, Dover-Foxcroft

For more information, please contact:

Jay Martin, Small Business Advocate

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